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No. 80-1188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES EDGAR,

Appellant,

against

MITE CORPORATION AND MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AS *AMICUS CURIAE*

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Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae

The North American Securities Administrators Association, Inc. (NASAA), a national organization whose membership includes the securities law administrators of the 50 States (except California), hereby respectfully moves for leave to file the attached brief, as *amicus curiae* in this case. The consent of the attorney for the Appellant has been obtained. The consent of the attorney for the Appellees was requested but was neither granted nor opposed.

The interest of NASAA in this case arises from the fact that thirty-six (36) of its member states have enacted and administer state laws regulating take-over offers, and that more than a dozen of those laws have been declared unconstitutional by federal courts in the last eighteen (18) months on the same Supremacy Clause and/or Commerce Clause grounds enunciated in the lower court decisions in this case. Several of the decisions regarding the laws of other states are at various levels of the appeal process. The Court's decision in this case will have wide-ranging impact on those appeals and on a number of state take-over laws which may or may not have provisions identical to those in the Illinois take-over law, particularly including the laws of nine (9) states that have recently been amended to remove Supremacy Clause problems regarding areas of conflict with the federal take-over procedures and to remove Commerce Clause problems concerning adequate state interests in asserting jurisdiction that were part of the basis of the lower court's decision in this case.

In the instant case, the focus of the arguments of the appellant and the appellees in the Court of Appeals regarding the Supremacy Clause and the Commerce Clause issues was narrow, isolating on the provisions of the Illinois law vis-a-vis the federal law. Since it is likely that the same situation will exist in the treatment of issues

before this Court, it is believed that the brief which *amicus curiae* is requesting permission to file will contain a discussion of the issues on a wider scope to provide the Court with a broader perspective as to how state take-over laws are not violative of Constitutional standards.

Respectfully submitted,

.....

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BRIEF FOR NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The North American Securities Administrators Association, Inc. (NASAA) is a non-profit voluntary membership corporation. Membership in NASAA is open to all state and provincial securities regulators and agencies in the United States, Canada, and Mexico. Presently its membership includes the state officials charged with the enforcement of the blue sky laws of all the states (except California), the District of Columbia, and Puerto Rico as well as all the Canadian provinces. The purpose of the organization is to deal with issues of common interest, to further the enforcement of the state blue sky laws, and to coordinate such state statutes with the federal securities laws by cooperating with the Securities and Exchange Commission (SEC) in areas of mutual interest.

Thirty-five states in addition to Illinois have takeover laws similar in purpose to the one whose constitutionality is challenged in the case at bar.* Most of these statutes are administered by the state securities agencies which are the members of NASAA. The decision of this Court as to the constitutionality of the Illinois Business Take-Over Act (Illinois Act), Ill. Rev. Stat. ch 121 1/2 §§ 137.51 *et seq.*, will have far reaching impact upon these other state takeover statutes and NASAA members, as many of such statutes have one or more provisions identical or similar in purpose to those challenged in the present case. This case is the first in which this Court will consider takeover statutes on their merits, the Court having disposed of a previous appeal involving the Idaho takeover statute on venue grounds in *Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979).

Summary of Argument

The Illinois Act does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Williams Act. Therefore, the Illinois Act is not constitutionally preempted by the Williams Act, 15 USC § 78m(d)-(e) 78n(d)-(f) (1976), and the SEC Rules thereunder. While the Illinois Act as written, but not as interpreted by the Illinois Secretary of State, suggests that it regulates questions of substantive fairness in connection with takeover offers, such sub-

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* See State of New York, Amicus Brief, p. 22 n. for a citation of the individual statutes. For surveys of the different forms of state takeover regulation *see* E. Aranow, H. Einhorn & Berlstein, Developments in Tender Offers for Corporate Control 207-17 (1977); Langevoort, *State Tender Offer Legislation: Interests, Effects and Political Competency*, 62 Cornell L. Rev. 213,219-40 (1977) and Moylan, *State Regulation of Tender Offers*, 58 Marq. L. Rev. 687,689-98 (1975). None of these surveys, however, reflect the changes in the state schemes effected in 1980 and 1981. For a more recent, although still incomplete survey, *see* Shapiro, *State Takeover Laws*, in Practicing Law Institute, Twelfth Annual Institute on Securities Regulation 401-442 (1980). *See also*, Sec. Reg. & L. Rep. (BNA) (No. 606), F-1-F-4 (June 3, 1981).

stantive or merit regulation is not inconsistent with the Congressional mandates of the Williams Act. The Williams Act adopts a full disclosure standard at the federal level, but does not prohibit the application of traditional state blue sky law standards of substantive or merit review of such offers under the state acts including the Illinois Act. Any incidental delay which may result from the Illinois Act inures to the benefit of investors and is therefore not inconsistent with Congressional objectives under the Williams Act.

Congress has specifically permitted state regulation of tender offers. The Illinois Act is not only a securities regulatory statute in the traditional sense, but it is also an organic corporate statute. Because it is a hybrid statute, it serves two separate, but clearly legitimate interests of the State of Illinois. As a securities regulatory statute, it seeks to protect the investors in the target company residing in the State of Illinois. As an organic corporate statute it seeks to protect all investors, whether located within the State of Illinois or elsewhere, who own securities of corporations incorporated under Illinois law or which have a substantial nexus with the State by having their executive offices and 10% of their capital within the State. It accomplishes this goal by providing a rule applicable to all shareholders governing the change of control of the corporation similar to rules involving sale of assets, mergers, consolidations, reorganizations, and the solicitation of proxies. The benefits conferred upon the shareholders by the Illinois Act far outweigh any alleged burdens of compliance.

The decision of this Court should acknowledge the constitutionality of the Illinois statute in its entirety under both the Supremacy and Commerce Clauses. However, should the Court feel compelled to invalidate one or more provisions of the Illinois Act, it should limit its decision in order to preserve those portions of the Illinois Act and other state takeover statutes which are constitutional. Further, it should provide Illinois and the other states with guidance as to the specific constitutional infirmities

that the Court finds in the Illinois Act, so that Illinois and other states may adopt takeover statutes which will be constitutionally permissible.

ARGUMENT

POINT I

The Illinois Act is both a securities regulatory measure and an organic corporate statute dealing with internal corporate governance.

The key to the NASAA position on the constitutionality of the Illinois Act lies in its belief that the Act is a hybrid statute combining two different investor protection concepts into a single statute. In one respect, it is a traditional blue sky statute aimed at the protection of Illinois investors. At the same time, it is an organic corporate statute protecting investors wherever they are located in connection with the change of control of the target corporation. In this sense the Act is similar to other traditional organic corporate statutes which control the internal governance of a corporation in connection with mergers, consolidations, sales of assets, reorganizations, and the solicitation of proxies.

The key section is Section 137.52-10 which defines a "target company" and reads:

> 'Target Company' means a corporation or other issuer of securities (1) of which 10% of the outstanding securities of the class of its equity securities which is the subject of a takeover offer is held of record by securityholders located in this State as determined by post office address as shown on the records of the issuer, or (2) which meets any two of the following conditions:
>
> (a) has its principal executive office in this State;
>
> (b) is organized under the laws of this State;
>
> (c) has at least 10% of its stated capital and paid-in surplus represented in this State.

NASAA submits that the first of these jurisdictional bases, that dealing with 10% stock ownership within the state, is a traditional securities regulation provision aimed only at the protection of Illinois shareholders and clearly within the legitimate interests of the State of Illinois as will be seen in Point III. The second basis, dealing with incorporation within the state or substantial presence therein, is a conventional state corporate law concept aimed at providing internal governance rules for corporations in which Illinois has a strong state interest. Again, this state interest will be developed in Point III.

The Seventh Circuit in the present case and the Fifth Circuit in *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1280 n.53 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979), did not adequately evaluate the dual nature of the jurisdictional bases of the statute. Had they done so, NASAA submits that they would have reached an opposite conclusion on both the Supremacy and Commerce Clause issues. *See AMCA International Corp.* v. *Krouse*, 482 F. Supp. 929 (S.D. Ohio 1979); *Wylain, Inc.* v. *TRE Corp.*, 412 A.2d 338 (Del. Ch. 1980); *Sharon Steel Corp.* v. *Whaland*, Cas. No. 80-333, —— A.2d —— (N.H. July 2, 1981); *Strode* v. *Esmark, Inc.*, [1980] Fed. Sec. L. Rep. (CCH) ¶ 97,538 (Ky. Cir. Ct. 1980), *aff'd* —— S.W.2d —— (Ky. App. Apr. 3, 1981).

The dual nature of the statute was recognized by Professor Shipman in his article, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W. Res. L. Rev. 722, 740-756 (1970). He stated:

> An implicit premise of the Act is that a takeover bid is essentially an internal affairs matter—one involving the relationships *inter sese* of the corporation, its directors, officers, and stockholders—which Ohio may reasonably regulate on a global basis.

Id. at 741-742. He then discusses the pros and cons of such a position including the fact that Congress in adopt-

ing the Williams Act considered takeover bids to be similar to proxy fights. H.R. Rep. No. 1711, 90th Cong., 2d Sess. (1968).

Professor Shipman concludes:

> [F]or the tendering securityholder in a securities bid, the effects are similar to those resulting from a merger, a classic internal affairs transaction.

Id. at 744-45. This concept has been recognized by the majority of recent legal commentators who have written in the area. *See, e.g.*, McCauliff, *Federalism and The Constitutionality of State Takeover Statutes*, 67 Va. L. Rev. 295, 303-304 (1981); Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation*, 36 Wash. & Lee L. Rev. 733, 741-746 (1979); *Sargent, On the Validity of State Takeover Regulation: State Response to Mite and Kidwell*, —— Ohio St. L. J. —— (due for Oct. 1981 publication), manuscript at 58-61; Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U. L. Rev. 872, 931-934 (1978).

Two articles noted by the Seventh Circuit have rejected this concept on the basis that a takeover is nothing more than a collection of individual sales of securities. *Wilner & Landy, The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1, 16-17 (1976); Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. Cal. L. Rev. 1133, 1153-55 (1974). However NASAA suggests this approach is near-sighted and rather naive. If this were true there would be no need for the Williams Act or the state takeover statutes. The entire area could be regulated by the anti-fraud provisions of the federal and state securities acts.

As noted above, four courts have reached the conclusion that the dual nature of the takeover statutes is sound. NASAA would agree and urges the Court to concur.

POINT II

The Illinois Act is not preempted by the Williams Act.

The Court of Appeals based its conclusion that the Illinois Act is preempted by the Williams Act on its interpretation of the Congressional intent underlying the Williams Act:

> We therefore conclude, purely in light of the congressional judgment and analysis, that tender offers may not be unduly hindered (by grossly extended delay under state law) to the detriment of investors. We reiterate that we possess no independent insight, based on evidence or research, about what the effect of slight or interminable delay may be. But we think the perspectives informing congressional legislation are reasonably clear and are binding upon us. Therefore, we conclude that the Illinois Act is preempted by the Williams Act because the former (1) tends inordinately to substitute regulatory control for investor autonomy, (2) provides for hearings the institution of which may be indirectly delegated to incumbent management and which are potentially interminable in length, (3) provides for other delays and mechanisms for delay which are potentially grossly in excess of the delay mandated by Congress and deemed by Congress to be appropriate to the protection of investors and (4) provides for lengthly prenotification delay, a requirement Congress specifically rejected. 633 F.2d 498-9.

NASAA submits, however, that the Court of Appeals erred in its conclusion because it misinterpreted the intent of Congress in enacting the Williams Act and misconstrued the effect the Illinois Act would have on a tender offer.

NASAA agrees with the Court of Appeals that Congress has neither expressly barred the states from regulating tender offers, nor enacted so pervasive a regulatory

scheme that implicit preemption may be inferred. 633 F.2d 491. Congess has declared that states may regulate tender offers provided that such regulation is not in conflict wtih the Williams Act. Securities Exchange Act § 28(a), 15 U.S.C. § 78bb(a). *Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 182 (1979). Where there is no explicit or implicit preemption, the Illinois Act must be upheld absent a showing that it is in conflict with the Williams Act. *Jones* v. *Rath Packing Co.*, 43 U.S. 519, 525-526 (1977). *See Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963).

NASAA submits that the Seventh Circuit erred in holding that the Illinois Act conflicts with the Williams Act and that it is an obstacle to the execution of Congressional objectives. NASAA in this brief will consider two of the four grounds which the Seventh Circuit felt caused the preemption of the Illinois Act: (1) that the Illinois Act tends inordinately to substitute regulatory control for investor autonomy, and (2) that the Act provides for other delays and mechanisms for delay which are potentially interminable in length. NASAA will not address the remaining two points, but joins with the State of Illinois in its brief in urging the Court to reverse these grounds also.

NASAA has not addressed the point of prenotification because it believes that the Court need not deal with this issue or, in the alternative, need only consider it in the limited factual context of this case. Since the filing of the original complaint in this case, the SEC has adopted SEC Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (1980). This Rule created and was intended by the SEC to create a conflict between the prenotification filing requirements of the various state statutes and the Williams Act and the Rules thereunder. See SEC Exchange Act Rel. No. 34-1634, [1979] Fed. Sec. L. Rep. (CCH) ¶ 82,373 (Nov. 29, 1979). NASAA contends that such Rule exceeds the SEC statutory rule-making authority under the Williams Act. *See* Note, *Kneeling To The SEC Rules: The Vir-*

ginia Takeover Act and SEC Tender Offer Rule 14d-2(b), 22 Wm. & Mary L. Rev. 487 (1981). That issue has been litigated in *Canadian Pacific Enterprises, Inc.* v. *Krouse*, 506 F. Supp. 1192 (S.D. Ohio), *appeal pend.*, No. 81-3083, (6th Cir.), where the regulations were held to have been validly adopted. Because of the Ohio litigation, the pre-notification issue may not be ripe for final adjudication until the validity of SEC Rule 14d-2(b) is before the Court.

In the interim, several states have eliminated the pre-notification conflict with SEC Rule 14d-2(b) by amending their takeover laws by statute or rule.*

Likewise, a number of states have eliminated the provision which the Seventh Circuit found offensive in Section 147-57 A, *requiring* the Secretary to hold a hearing when asked by a majority of the directors of the target company or 10% of the shareholders.** Ill. Rev. Stat. ch. 121 1/2 § 137-57 A. It should be noted that the Seventh Circuit did not find offensive a hearing provision which was discretionary with the state agency upon the request of the directors or shareholders of the target company. 633 F.2d at 495 n. 18.

A. The Substantive Review Provision of the Illinois Act is not in conflict with the Williams Act.

The Seventh Circuit concluded that the substantive merit review provision of Section 137.57 E allowing the Secretary of State to determine that an offer was inequitable and to seek an injunction barring it was in conflict with the free market approach which it felt was the essence of the Williams Act.* The Seventh Circuit said:

Illinois' substitution of the judgment of its Secretary

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* Connecticut, Idaho, Indiana, New Hampshire and Wisconsin.

** 14 states originally had such requirements, at least five, Connecticut, Idaho, Indiana, New Hampshire and Wisconsin, have repealed these provisions.

* Twelve states originally had such a requirement: Hawaii, Idaho, Illinois, Indiana, Louisiana, Minnesota, Mississippi, New Jersey, South Dakota, Tennessee, Texas and Wisconsin. At least four, Idaho, Indiana, South Dakota and Wisconsin, have removed this provision.

> of State for an investor's own assessment of the equitability of a tender offer is patently inconsistent with the Williams Act . . . . [T]his approach to investor protection by benevolent bureaucracy is preempted by the conflicting approach of the Williams Act, which contemplates unfettered choice by well-informed investors. Both the House and Senate Reports observed that '[t]his Bill is designed to make the relevant facts known so that the shareholders have a fair opportunity to make *their* decision.' 633 F.2d at 494. *Footnotes and citations omitted.*

The key to the Seventh Circuit's position is the quote from the House and Senate Reports and a statement of SEC Chairman Cohen quoted at 633 F.2d at 494 n. 14 from *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency,* 90th Cong., 1st Sess. 33 (1967). If the quoted passage reflects Congressional intent to exclude any type of regulation other than disclosure regulation, as the Seventh Circuit claims, then the Court of Appeals is correct. However, it is NASAA's position that the quoted language does not support that interpretation. Rather, NASAA believes that the quoted language is nothing more than a statement to the effect that the Williams Act follows the approach of all the other federal securities-related statutes and relies on full disclosure rather than the merit approach often used at the state level in securities regulation. The same is true of Chairman's Cohen's statement. It is not a statement that he disagrees with the merit approach or that the full disclosure approach is the only permissible one compatible with the Williams Act, it is merely a statement that the SEC will follow its traditional approach of requiring full disclosure. In order to support its position, NASAA points to three specific items.

First, the Williams Act was made a part of the Securities Exchange Act of 1934. That Act contains Section 28(a) which this Court in *Leroy* v. *Great Western United Corp.,* 443 U.S. 173, 182 (1979) said "was plainly intended to protect, rather than to limit, state authority." As

NASAA noted in Point I, and as the Seventh Circuit observed, the takeover statutes were not the type of activities originally contemplated by Section 28(a) since that Section preserves the right of the states to regulate securities matters and it is NASAA's position that the takeover statutes are hybrid securities and organic corporate statutes. However, it is clear that Section 28(a) was intended to preserve the right of the states in securities areas to continue the "benevolent bureaucracy" approach of fair, just, and equitable review which had long existed at the time of the passage of both the Securities Act of 1933 and the Securities Exchange Act of 1934.

At the time of the passsage of the Williams Act, there was only one state takeover statute, the Virginia Act, Va. Code 1950 §§ 13.1-528 *et seq.*, a disclosure statute. Therefore, NASAA believes that the SEC and Congress did not form a strong opinion for or against merit regulation of takeovers. As evidenced by the legislative history quoted by the Seventh Circuit, it merely continued the traditional federal pattern of disclosure regulation. However, NASAA submits that what limited opinion there was favored the continuation of the existing pattern of complementing state merit regulation.

The key to Congressional intent, NASAA submits, lies in the fact that Congress elected to insert the Williams Act into the existing Exchange Act which already contained Section 28(a). In 1968, under Section 28(a), state merit regulation and federal full disclosure had successfully co-opted for some 34 years in the securities area. Their complementary, rather than conflicting, nature was well known and considered desirable. NASAA urges that, by inserting the Williams Act in the 1934 Act, Congress consciously elected to continue this established complementary pattern into the takeover area as state statutes developed.

This conclusion is further supported by NASAA's second and third points. The SEC, the agency charged with

administratively interpreting the Williams Act, has consistently taken the position that merit regulation of takeovers in state or federally regulated industries, such as insurance, banking, and public utilities, is not inconsistent with the Williams Act. Nor did Congress itself consider merit regulation inconsistent with the Williams Act when it later passed the Hart-Scott-Rodino Act requiring substantive review in the anti-trust field.

Second, the SEC is on record as indicating that merit regulation is consistent with the Williams Act in connection with certain regulated industries. In SEC Exchange Act Rel. No. 16384, [1979] Fed. Sec. L. Rep. (CCH) ¶ 82, 373 (Nov. 29, 1979), at p. 82, 584, the Commission acknowledged the validity of federal merit review of regulated industry takeovers when it said:

> Thus, it appears that a tender offer which is appropriately conditioned upon obtaining the necessary regulatory approval may be published or sent or given in compliance with Rule 14d-2(b) without conflicting with such statutes.

See also Exchange Act Rel. No. 34-16623, 17 C.F.R. § 241.6623, 3 Fed. Sec. L. Rep. (CCH) ¶ 24, 2841 (Mar. 5, 1980), question and answer 5.

Both the SEC and the District Court recognized the right of a state to conduct merit regulatory review of a regulated industry in *Sun Life Group, Inc.* v. *Standard Life Ins. Co.*, [1979-80] Fed. Sec. L. Rep. (CCH) ¶ 97,314 (S.D. Ind. 1980); Memorandum of Securities and Exchange Commission, Amicus Curiae, *Sun Life Group* v. *Standard Life Ins. Co.*, C.A. No. IP 80-246-C (S.D. Ind.), dated Mar. 12, 1980 at 4-5.

Finally, Congress itself subjected takeover bids to merit regulation when it passed the provisions of the Hart-Scott-Rodino Antitrust Improvements Act in 1976 requiring antitrust review by the Department of Justice the Federal Trade Commission (FTC). 15 U.S.C. § 18a (1976).

If merit regulation in regulated industries at both the state and federal level and substantive review for anti-

trust purposes are consistent with the Williams Act, then why is not merit regulation under state takeover acts also consistent? Review under the Hart-Scott-Rodino Act and by regulatory agencies other than the securities commissioners clearly interfere with the free market concept which the Seventh Circuit finds paramount in the Williams Act. Yet such review is clearly contemplated. NASAA submits that merit review under the state takeover statutes is also consistent with the Williams Act and that the Seventh Circuit was in error concluding otherwise.

B. The delay caused under the hearing provision of the Illinois Act does not make it in conflict with the Williams Act.

The Seventh Circuit concluded that the delay caused by the hearing provision of the Illinois Act, Ill, Rev. Stat., ch. 121 1/2 § 137.57, caused the Illinois statute to be in conflict with the Williams Act. The essence of its holding is found in the following statement:

> [T]here is no evidence in the record about what actual effect of the potential for delay, inherent in the Illinois Act, has been. In absence of such evidence we ought not to second-guess Congress' judgment that delay grossly in excess of that contemplated by the Williams Act redounds to the detriment of stock holders by substantially deterring the making of tender offers.

633 F.2d at 498.

NASAA submits that this statement contains three conclusions, all of which are incorrect. First, it concludes that the delay under the Illinois Act is "*grossly in excess*" of what is allowed in the Williams Act. Second, it concludes that Congress felt that delay was contrary to the purpose of the Williams Act. And finally, it concludes that delay is detrimental to investors.

The Illinois Act provides for a hearing to be called within 15 business days after the filing and the hearing

to be held within 10 business days after the request. Ill. Rev. Stat., ch. 121 1/2, §§ 137.57 A, C. There is no time set for the hearing to be concluded, but the Secretary must render his decision within 15 business days after the conclusion of the hearing. Thus, as a maximum the process will take 40 business days after the filing excluding the time necessary for the hearing. This is a maximum; there is no indication that in actual practice that such would be the case. Is this delay grossly in excess of the time under the Williams Act?

As the Seventh Circuit and most people prior to the adoption of SEC Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (1980), contemplated, the offeror would file his notice with the states 20 days *before* making the offer under the Williams Act. In fact, SEC Rule 14d-2(b) was specifically adopted to place the Williams Act in conflict with this 20 day pre-filing provision. Thus, the 40 business day period under the Illinois Act began to run 20 business days *before* an offer was made under the Williams Act. Therefore, half of the hearing delay runs before the Williams Act comes into play.

The Williams Act itself requires a 10 day waiting period. Because the SEC found that this period was too short and tipped the supposedly neutral scheme of the Williams Act too much in favor of the offeror, *see* SEC Exchange Act Rel. No. 34-16384, [1979-80] Fed. Sec. L. Rep. (CCH) ¶ 82,373 (Nov. 29, 1979), Rule 14e-1, 17 C.F.R. § 240.14e-1 (1980), requiring the offer to be open for a period of 20 business days was adopted. When the remaining 20 business day delay is measured against this standard, NASAA submits that it is not grossly excessive.

Further, NASAA submits that Congress does not object to delay under the Williams Act. Much of the legislative history which the Seventh Circuit used to support its conclusion came from its consideration of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (1976). However, that Act requires a filing with the FTC and the Department of Justice in the case of certain takeover offers. There follows a 15 day wait-

ing period which can be extended another 10 days by the Justice Department or the FTC. Thus, in connection with tender offers, there is superimposed a 25 day potential administrative delay mandated by the Hart-Scott-Rodino Act. This administrative delay can be further extended by court order. It is hard to reconcile such delay under that Act with the conclusion of the Seventh Circuit that the Williams Act does not allow delay.

Finally NASAA submits that there is much evidence that delays are helpful to investors and not detrimental. Indeed, studies demonstrate that during the period between 1974 and 1980, taking all competitive hostile takeover bids into consideration, shareholders reaped $1.7 billion in premiums over the original offer price (rather than the lower market price), which premiums are attributable to extended time periods under state takeover laws. *See, e.g., Is the Takeover Game About to End,* 15 Financial World 59-60 (March 15, 1981); Chatlos, *The SEC vs. Investors on Tender Offers,* 56 Harv. Bus. Rev. 6-8 (Sept.-Oct. 1978). Another study of thirty-six unsolicited tender offers which were rejected by the target company between the end of 1973 and June 1979 indicates that more than half of the targets have their securities presently selling on the open market for more than the rejected offering price or were taken over by another company at a price higher than the first offering price. Lipton, *Takeover Bids in the Target's Boardroom,* 35 Bus. Law. 101, 106 (1979); Note, *Kneeling to The SEC Rules: The Virginia Takeover Act and SEC Tender Rule 14d-2(b),* 22 Wm. & Mary L. Rev. 486, 513 (1981). Still another study of 85 takeovers from January 1, 1976 to June 8, 1979, shows that in the case of virtually every company which initially resisted takeover and was subsequently acquired, the shareholders have received a price higher than the original offering price. Unpublished Study of Goldman, Sachs & Co., *cited in* Note, *Kneeling to The SEC Rules: The Virginia Takeover Act and SEC Tender Offer Rule 14d-2(b), supra.*

This type of information has led at least three courts to conclude that the delay caused by state takeover stat-

utes similar to that of Illinois is not inconsistent with the Williams Act. *AMCA International Corp.* v. *Krouse*, 482 F. Supp. 929 (S.D. Ohio 1979); *Strode* v. *Esmark*, [1980] Fed. Sec. L. Rep. (CCH) ¶ 97,538 (Ky. Cir. Ct. 1980), *aff'd* —— S.W.2d —— (Ky. App. Apr. 3, 1981); *Sharon Steel Corporation* v. *Whaland*, Cas. No. 80-333, —— A.2d —— (N.H. July 2, 1981). NASAA submits that this Court should so hold in the case at bar.

POINT III

The Illinois Statute Reasonably Regulates Legitimate and Important State Interests.

The plenary authority to regulate interstate commerce is given to Congress under the Commerce Clause. *Gibbons* v. *Ogden*, 22 U.S. 23 (1824). This power does not prevent the states from adopting legislation on matters affecting interstate commerce. Rather, states have always retained their authority to govern in areas of local concern. *See e.g., Southern Pacific Co.* v. *Arizona, ex rel. Sullivan*, 325 U.S. 761, 767 (1945). A successful challenge to the Illinois Act or any other such statute must overcome a strong presumption of the statute's validity and demonstrate that the statute not only does not further legitimate important state interests, but also that it impermissibly burdens interstate commerce.

A. There is a strong presumption of validity of state legislation in areas traditionally within the regulatory powers of the states, such as shareholder relations with corporations and corporate mergers, combinations, and change of control.

A strong presumption of validity of state legislation exists in areas traditionally within the police powers of the state. *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959). This presumption of validity cannot be overcome unless the local benefits are "so slight or problematical as not to outweigh the national interest . . .". *Southern Pacific Co.* v. *Arizona*, 325 U.S. at 776. Thus,

under the Commerce Clause, a state statute with respect to a legitimate state interest will be sustained unless the burden of interstate commerce is clearly shown to outweigh the state interest. *See also, O'Gorman* v. *Hartford*, 282 U.S. 251 (1931). As this Court said in *Boston & Maine Railroad Co.* v. *Armburg*,

> The interstate commerce clause did not withdraw from the states the power to legislate with respect to their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce and persons engaged in it.

285 U.S. 234, 238 (1932). Moreover, when a state statute is challenged under the Commerce Clause, it must be presumed that the historic police powers of the state were constitutionally exercised. *See e.g., Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947).

This presumption of constitutionality is particularly important in areas such as corporate regulation which have been traditionally left to the states, *see, e.g., Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 479 (1977); *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 40-41 (1977), and securities regulation where the federal and state governments have shared regulatory responsibility. *See, e.g., Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917); *Merrick* v. *N.W. Halsey & Co.*, 242 U.S. 568 (1917); *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917).

B. The Illinois Act does regulate a legitimate and legislatively-determined important interest of the State of Illinois.

The key to determining whether the Illinois Act regulates a legitimate and important interest of the State of Illinois is to examine the purpose for which the statute was passed. The acknowledged purpose of the Illinois Act, like all other takeover statutes and the Williams Act itself, is investor protection. *Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977). However, the protection afforded under

the Illinois Act, like most takeover statutes, is not limited to Illinois investors. The Illinois Act is clearly intended to have extraterritorial effect. Under Section 137.57 E, the Illinois Secretary of State is required to determine, if a hearing is held: (1) that the offer makes full and fair disclosure; (2) that it is not inequitable; and (3) that the offer is being made to Illinois offerees on substantially equal terms. Ill. Rev. Stat. ch 121 1/2 § 137.57 E. If he determines that these conditions are not met then he is empowered to seek an injunction under Section 137.62 against the making of the offer, not only in the State of Illinois, but elsewhere as well. Ill. Rev. Stat. ch 121 1/2 § 137.62.

It is this extraterritorial effect of the statute which caused the Seventh Circuit in the case at bar and the Fifth Circuit in *Great Western United Corp.* v. *Kidwell, supra,* to include that the Illinois and Idaho Acts, respectively, did not serve legitimate state interests. NASAA submits that both courts reached an improper conclusion on the state interest issue because neither court adequately considered all the jurisdictional bases of the statutes as identified in the statutes themselves.

The Illinois Act in Section 137.52-10 indicates two separate jurisdictional bases: (1) if 10% of the outstanding securities of the class of equity securities subject to the tender offer are owned by Illinois security holders of record; or (2) if any two of the following three conditions are present (a) the target company has its principal executive office in Illinois; (b) target company is organized under the laws of the State of Illinois; or (c) the target company has at least 10% of its stated capital and paid-in surplus in the state. Ill. Rev. Stat. ch. 121 1/2 § 137.52-10.

NASAA submits that the first of these is a traditional securities regulation basis. Except as noted below in subpoint E, where it is necessary to give extraterritorial effect to the local statute to protect the effect of the statute within the enacting jurisdiction, such statutes are not to

be given extraterritorial effect. Thus, the primary goal here is not to protect investors in general wherever they live, but rather to protect Illinois investors. To do so, however, may require that Illinois incidentally protect other states' investors also. The second jurisdictional basis, however, is not a securities regulation basis, but derives from organic corporate law. It does not purport to protect only the Illinois investors, rather it purports to protect all the securities holders of the target corporation wherever they are located.

C. Illinois as a matter of organic corporate law has a legitimate interest in having its statutes applied extraterritorially to govern the internal affairs of any corporation organized under its laws.

The first branch of the second jurisdictional basis is that the target company is an Illinois corporation because it is organized under the laws of Illinois. It has long been recognized by this Court and commentators that the corporate law of a particular state will be given extraterritorial effect when governing the internal affairs of a corporation. *See, e.g., Bank of Augusta* v. *Earle*, 38 U.S. (12 Pet.) 519 (1839); Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Scope of Full Faith and Credit*, 58 Colum. L. Rev. 1118 (1958); Latty, *Pseudo-Foreign Corporations*, 65 Yale L.J. 137 (1955). The application of the law of the place of incorporation has also been applied to extraordinary corporate transactions such as mergers, consolidations, and other reorganizations. *See, e.g.*, Cowett, *Reorganizations, Consolidations, Mergers, and Related Corporate Events Under the Blue Sky Laws: Part II— Constitutional Considerations*, 13 Bus. Lawyer 760, 766 (1958), where Mr.Cowett takes the position that the blue sky law of the state in which the investors are located would not apply, but that the law of the state of incorporation would control.

As pointed out in Point I, NASAA takes the position that a takeover bid involves not only the collective sale

by individual shareholders, but also the effective transfer of control of the corporation. Therefore, a takeover bid should not be treated exclusively as a securities regulation matter, but should be treated as a matter involving the internal governance of the corporation as well. This latter element —— the internal governance aspect —— is traditionally regulated by state organic corporate law. Thus, as to this aspect, takeover bid regulation is an organic corporate matter governed not by securities concepts but rather by state organic corporate law principles.

The Seventh Circuit in the case at bar, as did the Fifth Circuit in *Kidwell, supra,* 577 F.2d at 1280 n.53, recognized the validity of the extraterritorial application of the takeover statutes had the target corporation involved been incorporated in either Illinois or Idaho. This conclusion coupled with the above discussion would suggest that incorporation within the state alone would provide the necessary state interest to prevent invalidation on Commerce Clause grounds because of the extraterritorial application of the statute. It was so held in *Wylain, Inc.* v. *TRE Corp.,* 412 A.2d 338 (Del. Ch. 1980), where the Delaware court concluded that the Delaware Takeover Statute was constitutional whether classified as an internal governance statute or merely regulating affairs between corporate shareholders and third parties.

The Illinois statute does not attempt to occupy the entire constitutionally acceptable field, but requires the presence of one or the other of the two remaining jurisdictional branches within the second basis. Other courts have held that incorporation plus additional state interest are sufficient to support a takeover statute. *AMCA International Corp.* v. *Krouse,* 482 F. Supp. 929 (S.D. Ohio 1979); *Strode* v. *Esmark* [1980], Fed. Sec. L. Rep. (CCH) ¶ 97,538 (Ky. Cir. Ct. 1980), *aff'd* —— S.W.2d —— Ky. App. April 3, 1981). Chicago Rivet in the case at bar was not an Illinois corporation; consequently this jurisdictional branch was not applicable.

D. Illinois as a matter of organic corporate law has a legitimate interest in having its statutes applied extraterritorially to govern the internal affairs of any corporation which has its executive office in the state or which has at least 10% of its stated capital and paid-in surplus in the state.

The second and third jurisdictional branches are that the target corporation had its executive office in Illinois and that it had 10% of its capital and paid-in surplus in the state. These items will be considered together since the Illinois Act requires two out of the three branches to be present before jurisdiction attaches and the necessary state interest would be supplied by the fact of incorporation within the state if that were one of the two branches. Further, it appears that these were the two items relied upon by the Illinois Secretary of State.

The Seventh Circuit did not address these jurisdictional grounds in its opinion. The Fifth Circuit dismissed similar grounds under the Idaho statute in a single footnote. *Kidwell, supra,* 577 F.2d at 1280 n. 53. With due respect to both courts, NASAA submits that this constituted an error of major proportions. While it has long been recogtnized, as oulined in previous subpoint III B that the law of the state of incorporation will normally govern the internal operations of a corporation, in recent years there has been growing recognition by both the courts and the legal commentators that a state, other than the state of incorporation, may have a sufficient nexus with a particular corporation to replace the law of incorporation with its own substantive corporate law. *See, e.g., German-American Coffee Co.* v. *Diehl,* 216 N.Y. 57, 109 N.E. 875 (1915) (per Cardozo, J.); *Toklan Royalty Corp.* v. *Tiffany,* 193 Okl. 120, 141 P.2d 571 (1943); *State ex rel. Weede* v. *Iowa Southern Utilities Co.,* 231 Iowa 784, 2 N.W.2d 372, *supplemental opinion,* 4 N.W.2d 869 (1942); Latty, *Pseudo-Foreign Corporations,* 65 Yale L.J. 137 (1955); Kaplan, *Foreign Corporations and Local Corporate Policy,* 21 Vand. L. Rev. 433 (1968); Baraf, *The Foreign Corpora-*

tion—A Problem in Choice-of-Law Doctrine, 33 Bklyn. L. Rev. 219 (1967).

New York has long imposed certain provisions of its corporate statutes on foreign corporations doing business in New York. The original statute enacted in 1897, N.Y. Sess. Law 1897, ch. 384, § 4, did not place any limitations on the applicability of these sections other than that the corporation had to be doing business in New York. Kaplan, *Foreign Corporations and Local Corporate Policy,* 21 Vand. L. Rev. 433, 448 (1968). In the more than sixty years that this statute was in effect it was never challenged on constitutional grounds even though there were numerous cases brought under it imposing liability outside the borders of New York. *Kaplan, supra,* at 449. *See generally,* Baraf, *The Foreign Corporation—A Problem In Choice-of-Law Doctrine,* 33 Bklyn. L. Rev. 219 (1967). In 1963, the New York statute was amended to limit the application to corporations which did more than 50% of their business in New York and were not listed on a national stock exchange. See H. Henn, Appendix 4, Checklist 10, "Foreign Corporations", in 2 N.Y. Bus. Corp. Law 636-643 (McKinney 1963).

While originally applied by Professor Latty to corporations which had all of their business and most of their shareholders in a state other than their state of incorporation, the reach of the doctrine was extended by Professor Kaplan to "quasi-foreign" corporations and "national" corporations. He defined a "national" corporation as one which is incorporated in one state, has its main office in another, and business activities scattered throughout the country. Kaplan, *supa,* at 439. A "quasi-foreign" corporation he defined as a corporation incorporated in one state but doing business in two or three other states in relatively equal shares. Kaplan, *supra,* at 439.

Even commentators such as Professors Reese and Kaufman and Mister Cowett, who argue strongly for the application of the law of the state of incorporation, recognize the validity of the pseudo-foreign corporation con-

cept and the ability of the host state to impose its law. Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit,* 58 Colum. L. Rev. 1118 (1958); Cowett, *Reorganizations, Consolidations, Mergers, and Related Corporate Events Under the Blue Sky Laws,* 13 Bus. Lawyer 760, 766 (1958).

None of these authorities find that the imposition of the local corporate law on a foreign corporation by the host state is unconstitutional. Professor Kaplan summarized saying:

> There is apparently no constitutional barrier presently raised against such action by the host state; it also appears within the power of the host state to impose conditions of entry which require that the foreign corporation be bound by specified statutory requirements concerning the internal affairs of the corporation.

Kaplan, *supra,* at 460.

This Court has considered and upheld provisions of the California Corporation Code imposing liability upon shareholders of a foreign corporation doing business in California. *Pinney* v. *Nelson,* 183 U.S. 144 (1901) and *Thomas* v. *Mathiessen,* 232 U.S. 221 (1914).

The application of the pseudo-foreign corporation doctrine has also been approved by a number of commentators as a proper justification for state jurisdiction under state takeover statutes similar to the Illinois provision. Professor Shipman, discussing the Ohio Takeover Act, recognized the extraterritorial effect of the Act and justified it on the basis of the pseudo-foreign corporation doctrine. Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 Case W. Res. L. Rev. 722, 751-756 (1970). He indicates that he feels that the legislature has sufficient nexus with any "Ohio-based" corporation to sustain the application of the Ohio Takeover Act to that corporation. *Id.* at 755. He then defines an Ohio-based corporation to include cor-

porations having either its principal place of business or substantial assets in the state.

Professor Shipman's position was later adopted by the American Law Institute and Professor Loss in drafting the proposed Federal Securities Code. The Code in Section 1904(c) pre-empts all state takeover statutes except those which limit their regulation to takeovers involving corporations which have their *principal place of business* within the regulating state as well as 50% or more of their shareholders, either legally or beneficially, located in the state. American Law Institute, Federal Securities Code Proposed Official Draft § 1904(c) (1980). This same scheme was recommended to Congress by the SEC in its proposed amendments to the Williams Act. S. 3188, 96th Cong., 2d Sess. § 10. While this provision does require the additional nexus of stock ownership within the state, it clearly recognizes that a state other than a state of incorporation, the state *where the principal place of business is located*, the equivalent of the Illinois requirement of the corporate executive office be located within the state, does have a legitimate interest in regulating takeover bids for corporations not incorporated within the state.

As to the necessity of coupling the principal place of business requirement with stock ownership, Professor Kaplan, commenting upon the New York provisions discussed above, which required 50% of foreign corporate business within the state before application said:

> Whether the criteria selected by New York as broad or as comprehensive as they might constitutionally be, *is unlikely*. Another state, following the same theory of defining the area in which its desires to have its local policy applied, might select other criteria, thereby embracing different categories of foreign corporations.

Kaplan, *supra*, at 449. *Emphasis added.*

NASAA submits that the requirement that the principal place of business or executive office located within the

state, as under the Illinois Act, is sufficient nexus to provide legitimate state interest so that the host state may regulate he takeovers of such corporations. However, clearly, this state interest is present when the principal place of business concept is joined with some other nexus such as stock ownership, assets located in the state, or, as in the Illinois Act a percentage of capital located within the state.

This position won favorable approval from the Supreme Court of New Hampshire in the most recently decided takeover case. *Sharon Steel Corp.* v. *Whaland,* Case No. 80-333, —— A.2d —— (N.H. July 2, 1981). N.H. RSA § 421-A:2 VI defines a takeover bid to include a bid for the securities of any corporation formed under the laws of New Hampshire; having its principal place of business in New Hampshire; or having its principal executive office in the state. Sharon Steel Corporation made an offer for the stock of Nashua Corporation. Nashua was a Delaware corporation with its principal place of business in New Hampshire and between 10-15% of its shares were owned by New Hampshire residents. The court turned back a claim that the statute was a burden on interstate commerce saying:

> The State of New Hampshire has a legitimate local interest in regulating takeover attempts involving a possible change of control of companies headquartered in this State who likely would have a disproportionately large percentage of stockholders located here.

Slip Opinion at 14-15.

NASAA echoes the statement of the New Hampshire court and urges the Court to find, contrary to the Seventh Circuit, that the State of Illinois had a legitimate state interest in controlling the possible change of control of Chicago Rivent under the standards of the Illinois Act. Chicago Rivet had its headquarters in Illinois and apparently more than 10% of its capital and paid-in surplus there. Further, as the Seventh Circuit identified, 27% of Chicago Rivet's shareholders of record were Illinois residents and they held 43% of Rivet's outstanding shares.

633 F.2d at 501. Thus under the facts of the case at bar, the Illinois jurisdictional tests are more than met, and Illinois has a strong and legitimate state interest in the transfer of control of Rivet, even though Rivet is not an Illinois corporation.

E. Where Illinois has a legitimate state interest, the protection of such interest will not be defeated under the Commerce Clause because protection of that interest requires that state action to be given extraterritorial effect.

This Court in a long series of cases has held that the mere fact that local action also has a non-local effect does not necessarily vitiate a state scheme of regulation. *See, e.g., Minnesota* v. *Clover Leaf Cremery Co.*, —— U.S. ——, 66 L. Ed. 647, 649 (1981); *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 440 (1978) *Huron Cement Co.* v. *Detroit*, 362 U.S. 761, 770 (1945). NASAA submits that the Court should reach the same conclusion when the State of Illinois acts upon the first of its jurisdictional bases—when 10% or more of the outstanding shares sought are owned by Illinois residents. Ill. Rev. Stat. ch 121 ½, § 137.52-10(1). Here, clearly, the State's interest is in protecting the shareholders resident within its borders, and not protecting the residents of other states. Both the Seventh Circuit in the present case and the Fifth Circuit in *Kidwell, supra*, acknowledged that protection of its own citizens would be a legitimate state interest.

The problem seen by the Fifth Circuit in *Kidwell* and the Seventh Circuit in the present case is the extraterritorial effect of the state agency's action under the takeover statute. NASAA submits that the non-local impact under this jurisdictional bases is merely incidental, albeit necessary to protect the local Illinois interest of Illinois investor protection. Without the extraterritorial effect of the state action to stop the entire takeover bid, the takeover could be completed and control of the corporation shifted to the detriment of Illinois and its shareholders. An injunction which was limited in its scope to restrain-

ing the takeover bid within the borders of Illinois would be ineffective. *Western Airlines, Inc.* v. *Sobieski*, 191 Cal. App.2d 399, 12 Cal. Rptr. 719 (1961), *subsequent decisions Western Airlines, Inc.* v. *Schutzbank*, 258 Cal. App.2d 291, 66 Cal. Rptr. 293 (1968) and *People* v. *Western Airlines, Inc.*, 258 Cal. App.2d 286, 66 Cal. Rptr. 316 (1968). The offeror could merely purchase the securities necessary to complete his takeover from shareholders residing in other states. Thus while the takeover would clearly impact upon Illinois and its residents, Illinois would be powerless to act.

There are a number of situations involving corporations where state statutes which are normally accorded only territorial effect are allowed to impact outside the state's boundaries without running afoul of the Commerce Clause. The state anti-trust laws are one such example. *See* Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation*, 36 Wash. & Lee L. Rev. 733, 744 (1979). In *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909), where Argansas was allowed to exclude a corporation from doing business in the state for anti-trust activity which took place outside Arkansas and which had no impact within the state. *See also Exxon* v. *Governor of Maryland*, 437 U.S. 117 (1978); *Osborn* v. *Ozlin*, 310 U.S. 53 (1940).

Another example is the New York foreign corporation restrictions discussed in the last subpoint. One of these restrictions is on the ability of the foreign corporation to pay dividends when allowed by the state of incorporation, but not allowed by New York law. If this provision was not given extraterritorial effect, New York could prohibit the payment of dividends to New York residents, but not the payment to non-residents. This would defeat the purpose of the statute which is to prevent the dissipation of corporate assets and would cause shareholders to be treated unequally. In a series of cases, the New York restrictions have been upheld. *Irving Trust Co.* v. *Maryland Casualty Co.*, 83 F.2d 168 (2d Cir.) (per

L. Hand, J), *cert. denied*, 299 U.S. 571 (1936); *International Ticket Scale Corp.* v. *United States*, 165 F.2d 358 (2d Cir. 1948); *International Paper Co.* v. *United States*, 88 F. Supp. 891 (Ct.Cl. 1950); *German-American Coffee Co.* v. *Diehl*, 216 N.Y. 57, 109 N.E. 875 (1915) (per Cardozo, J.), discussed in Baraf, *The Foreign Corpoartion—A Problem in Choice-of-Law* Doctrine, 33 Bklyn. L. Rev. 219 (1967).

Probably the best example of the extraterritorial application of a state statute designed to protect local interest is *Western Airlines, Inc.* v. *Sobieski*, 191 Cal. App.2d 399, 12 Cal. Rptr. 719 (1961); *subsequent opinions Western Airlines, Inc.* v. *Schutzbank*, 258 Cal. App. 291, 66 Cal. Rptr. 292 (1968) and *People* v. *Western Airlines*, 258 Cal. App.2d 286, 66 Cal. Rptr. 316 (1968). This case is directly in point in that the California Corporation Commissioner determined that the amendment of Western's charter to eliminate cumulative voting constituted a sale of securities under the California Securities Act and was not fair, just, and equitable. Western was a Delaware corporation and a Delaware court had ordered the airline to elect its directors under straight voting according to the amended charter. The California Commissioner sought and received an injunction prohibiting such election. The appellate court upheld the Commissioner against constitutional attack. 191 Cal. App.2d 399, 411, 12 Cal. Rptr. 719, 727 (1961). *See also*, Kaplan, *supra*, 453-457.

In this case granting an injunction which was only effective in California would not work. In order to protect the California interest in seeing that the change in voting rights was fair, just, and equitable, it was necessary to bar straight voting by all shareholders whether located in or outside California.

NASAA submits that the same is true in the present case. To allow a takeover offer to continue in violation of the Illinois Act outside Illinois would have the effect of undercutting the legitimate state interest of protecting Illinois investors. Therefore the protection of

non-Illinois investors is merely incidental to an act aimed at the protection of Illinois' own residents and should be held not to violate the Commerce Clause. Illinois does have a valid interest to protect and has used the only method available to it to protect that interest. *See also Travelers Health Association* v. *Virginia ex rel. State Corporation Commission,* 339 U.S. 643 (1950) and *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U.S. 177 (1938).

F. The Illinois statute does not place an impermissible burden on interstate commerce when weighed against the legitimate local interest sought to be protected.

Both the Seventh Circuit in the present case and the Fifth Circuit in the *Kidwell* case, *supra,* spent little time attempting to balance the state interests claimed against the purported burden of interstate commerce as required by this Court's decision in *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970). Judge Wisdom in *Kidwell, supra,* at 1286 disposed of the issue by the conclusory statement that: "Idaho's law halted over 31 million dollars of interstate commerce." The Seventh Circuit made reference to a 23 million dollar impact and the fact that two or more states *might* attempt to assert *jurisdiction,* admitting that this was muted by the comity provision in the Illinois Act, allowing Illinois to defer to another state. 633 F.2d at 502 n. 31. The Seventh Circuit did not point out that Pennsylvania, the only other state which appeared to have any interest in the takeover of Chicoga Rivet, refused to take jurisdiction of the takeover.

This leads NASAA to believe that the real issue is whether the states have sufficient local interest to adopt takeover statutes and once this has been decided favorably to them, there will be little problem with the balancing issue. In light of this conclusion, NASAA will not extend its *amicus* brief on this issue beyond several very simple observations, but will adopt the arguments made on this point by the State of Illinois in its brief and by the State of New York in its *amicus* brief.

The statements by the Seventh and Fifth Circuit are merely conclusory. In fact, the takeover statutes do not in any real way prohibit takeover offers, merely require them to go forward under additional regulation for the protection of investors. Several courts have found that the takeover statutes have not in any way inhibited takeovers at all in that the number of takeovers has vastly increased even though the number of takeover statutes has likewise increased. *See, e.g., AMCA International Corp.* v. *Krouse,* 482 F. Supp. 929 (S.D. Ohio 1979); *Sharon Steel Corp.* v. *Whaland,* Cas. No. 80-333, —— A.2d —— (N.H. July 2, 1981); *Strode* v. *Esmark, Inc.,* [1980] Fed. Sec. L. Rep. (CCH) ¶ 97,538 (Ky. Cir. Ct. 1980), aff'd —— S.W.2d —— (Ky. App. Apr. 3, 1981). *See also, Telvest, Inc.* v. *Bradshaw,* 618 F.2d 1029 (4th Cir. 1980) and Note, *Kneeling to the SEC Rules: The Virginia Takeover Act and SEC Tender Offer Rule 14d-2(b),* 22 Wm. & Mary L. Rev. 487, 513 (1981).

NASAA submits that the balancing of the legitimate state interests established above when balanced against any purported burden on interstate commerce will necessarily come down on the side of the constitutionality of the state statutes. *See e.g.,* McCauliff, *Federalism and The Constitutionality of State Takeover Statutes,* 67 Va. L. Rev. 295, 303-305 (1981); Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western,* 53 N.Y.U. L. Rev. 872, 939 (1978).

CONCLUSION

The decision of the Court of Appeals should be reversed.

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Respectfully submitted,

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